

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Department of Insurance on the specified issues. The Advisory Opinion is not legally binding on either the Department or the reader.

ADVISORY OPINION 2001-08

RE: Acting as Agent

Exception to Appointment

Termination of Appointment

The Department issued Bulletin 97-5 as a result of investigations into complaints involving persons acting as agents without a license. The statutes upon which that bulletin was based have been amended recently as part of the adoption of the National Association of Insurance Commissioners' model licensing act. Therefore, the Department is withdrawing Bulletin 97-5 and issuing Advisory Opinion 2001-08 to re-emphasize what activities require an agent license under the current law. Additionally, questions regarding the procedure for termination of appointments have prompted the Department to restate the guidelines set forth in Bulletin 86-11. This advisory opinion supercedes Bulletin 86-11 sections "Exceptions to License Requirements" and "Termination of Appointments or Limited Licenses."

ACTING AS AGENT

Activities Requiring Agent License

KRS 304.9-020(1) provides that

"Agent" means an individual or business entity required to be licensed and appointed under the laws of this state to sell, solicit, or negotiate insurance or annuity contracts.

Hence, in general, any activity that involves the sale, solicitation, or negotiation of policies or certificates triggers the requirement for an agent license. The Department now, as in the past, strictly applies the licensing requirement and considers a person engaged in any of the following activities to be acting as an agent:

- Collecting or even holding premium in any manner,
- Explaining coverages or benefits to insureds or prospective insureds,
- Quoting rates,
- Actively seeking insureds for a particular insurer, or
- Taking or filling out application.

The Department's position is upheld by the long standing Attorney General Opinion, (1956 OAG 38.760), which concluded an automobile dealership that "...aids and assists prospective purchasers in the selection of insurance and filling out applications of insurance, and further who for the finance factor [lender] or insurer secures the payment of insurance premiums or charges, and (either directly or indirectly remits same to the finance factor [lender] or insurer)..." was acting as an agent. Anyone found to be engaging in one or more of described activities but is not licensed as an agent is in violation of KRS 304.9-080, unless that person is exempted from the definition of an agent pursuant to KRS 304.9-090.

Exceptions

An individual who meets the criteria of any subparagraph under KRS 304.9-090(3)(a) to (h) is not required to be licensed as an agent. The exception that was addressed in Bulletin 86-11 and continually requires clarification concerns the enrollment of individuals into group plans as provided in KRS 304.9-090(3)(b)

A license as an agent or consultant shall not be required of the following:

(b) The individual secures and furnishes information for the purpose of group life

insurance, group property and casualty insurance, group annuities, group or blanket accident and health insurance, or for the purpose of enrolling individuals under plans, issuing certificates under plans, or otherwise assisting in administering plans; or performs administrative services related to a mass marketed property and casualty insurance, where no commission is paid to the individual for the service.

The Department makes a distinction between the term "enroll," which means "to register; to make a record; to enter on the rolls of a court; to transcribe" (Black's Law Dictionary, 475, 5th ed. 1979) and the term "solicit," which KRS 304.9-020(9) defines as "attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company." In other words, an unlicensed employee may hand a customer a brochure explaining the coverage, may provide scripted information pre-approved by the Department, or may inquire whether or not the customer wants insurance through a group policy if a simple "yes" or "no" answer is given. However, if the customer wants ANY additional information, the customer must be referred to a licensed agent.

The unlicensed person who refers a customer inquiring about insurance to a licensed agent may receive a referral fee. However, care must be taken to avoid actions that would constitute illegal sharing of commission and payment of commission to or receipt of commission by an unlicensed person. (See KRS 304.9-135, 304.9-136, 304.9-421, and 304.9-425.)

Insurer's Responsibility

If an insurer accepts insurance from a person violating KRS 304.9-080, the insurer is in violation of KRS 304.9-080(5); and the insurer is subject to a penalty pursuant to KRS 304.3-200 and 304.99-020.

Please note that the Department is stepping up its investigation of unlicensed agent activity due to the increasing number of complaints.

EXCEPTION TO APPOINTMENT

The Department has also received questions concerning placing business with insurers with whom the agent is not appointed. Agents are allowed an exception to the appointment requirement

- Occasionally pursuant to KRS 304.9-410, or
- For 30 days with specific proof of financial responsibility on file with the Department pursuant to 806 KAR 9:200 or 304.9-270(3).

Occasionally Placed Business

KRS 304.9-410(1)(a) provides that an agent authorized to sell property, casualty, surety, marine and transportation, or mortgage guaranty insurance may "occasionally place an insurance coverage with an insurer as to which he is not then appointed as an agent" through a licensed resident agent of the insurer. Also, this agent may, without limitation, place business with insurers through licensed managing general agents.

Similarly, KRS 304.9-410(2) provides that an agent with a life or health line of authority "may, occasionally, place with another insurer as to which he is not licensed as agent, a particular risk or portion thereof which has been rejected by the insurers as to which the agent is licensed or is known to the agent to be unacceptable to such insurers." This exception to the appointment requirement is limited to risks which are unacceptable to all of the agent's appointing insurers.

806 KAR 9:200 provides under this appointment exception that the agent "shall not place insurance with a premium of more than twenty (20) percent of the agent's total premium for the preceding calendar year with insurers for which the agent holds no appointment."

Financial Responsibility of \$1,000,000/\$2,000,000

KRS 304.9-270 allows an agent to "act as a representative of and place insurance with an insurer without first obtaining approval of the appointment by the commissioner for a period of thirty (30) days from the date the first insurance application is executed by the agent" if the agent has on file with the commissioner evidence of financial responsibility for at least \$1,000,000 per occurrence and \$2,000,000

in the aggregate for all occurrences within one year. (Details concerning the forms and procedures for filing the bonds, errors and omission policies, and deposits that are acceptable for fulfilling this requirement may be found on the Department's Web site.)

TERMINATION OF APPOINTMENT

At Agent's Request

Under KRS 304.9-270 and 304.9-280, the insurer has the sole authority to make appointments and to terminate appointments; the Department merely approves or disapproves the insurer's actions. Further, subject to an agent's contract rights, if any, an insurer may terminate an appointment at any time. But if an agent requests an insurer to terminate the appointment and the insurer fails to terminate the appointment within a reasonable time, the agent may request assistance from the Department. The agent should enclose a copy of the letter sent to the appointing insurer for termination. Upon receipt of the agent's request, the Department will send a request of termination to the insurer.

Insurer's Notification to Department

KRS 304.9-280(2), as amended in 2000, provides in relevant part:

An insurer or authorized representative of the insurer that terminates the appointment, employment, contract, or other insurance business relationship with a licensee shall notify the commissioner within thirty (30) days following the effective date of the termination using a form prescribed by the commissioner, if the reason for termination is one (1) of the reasons set forth in KRS 304.9-440 or if the insurer has knowledge the licensee was found by a court, government body, or self-regulatory organization authorized by law to have engaged in any of the activities in KRS 304.9-440.

If the insurer terminates the appointment for one of the reasons in KRS 304.9-440 (revocation of license), the insurer has to send the agent a copy of the notification within 15 days by certified mail or by overnight delivery to the agent's last know address. And the agent has 30 days to file written comments concerning the substance of the notification with the commissioner. The written comments will become part of the commissioner's file and accompany every copy of a report disclosed for any reason about the licensee.

Similarly, KRS 304.9-280(3) provides in relevant part:

An insurer or authorized representative of the insurer that terminates the appointment of a licensee for any reason not set forth in subsection (2) of this section, shall notify the commissioner within thirty (30) days following the effective date of the termination using a form prescribed by the commissioner.

If the insurer terminates the appointment for some reason other than the reasons in KRS 304.9-440, the insurer has to send the agent a copy of the notification within 15 days by first class mail to the agent's last known address.

SCOPE OF ADVISORY OPINION

This advisory opinion is intended as notice to all agents and insurers that an unlicensed individual acting as an agent will not be tolerated. Insurers are charged with notifying each of their appointed agents of this Departmental policy. The procedures regarding termination of appointment are for informational purposes only. Any questions concerning these matters should be directed to the Legal Division of the Department at (502) 564-6032.

Janie A. Miller, Commissioner

Kentucky Department of Insurance

Date